BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RENEE SHADDUCK	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,729
KANSAS UNIVERSITY PHYSICIANS	)	
Respondent	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE CO. AND	)	
COMMERCE & INDUSTRY INSURANCE CO.	)	
Insurance Carriers	)	

ORDER

Respondent and one of its insurance carriers, Commerce & Industry Insurance Company, appealed the October 7, 2005, Order entered by Administrative Law Judge Kenneth J. Hursh. After reviewing the parties' briefs, the Board placed this post-award proceeding on its summary calendar for disposition without oral argument.

APPEARANCES

Chris Miller of Lawrence, Kansas, appeared for claimant. John B. Rathmel of Merriam, Kansas, appeared for respondent and its insurance carrier Commerce & Industry Insurance Company (Commerce). Katharine M. Collins of Overland Park, Kansas, appeared for respondent and its former insurance carrier St. Paul Fire & Marine Insurance Company (St. Paul).[1]

RECORD AND STIPULATIONS

On January 21, 2002, the parties attended a settlement hearing at which Special Administrative Law Judge Mark Ferguson approved the parties' settlement agreement and

[1] Ms. Collins limited her appearance on behalf of respondent for the series of repetitive traumas that ended October 9, 2000. It is clear that Ms. Collins was not representing respondent regarding any subsequent injuries or accidents.

granted claimant workers compensation benefits for repetitive trauma injuries to her upper extremities. The Board adopts the stipulations set forth at that settlement hearing.

In addition to the transcript from the January 21, 2002, settlement hearing, the record also includes the transcripts from the February 23, 2004, May 17, 2004, and October 5, 2005, hearings before Judge Hursh and the transcript from a March 15, 2004, deposition of Dr. Bradley W. Storm.

ISSUES

Following an October 5, 2005, hearing for penalties, Judge Hursh entered the October 7, 2005, Order in which respondent and its insurance carrier, Commerce, were ordered to pay claimant penalties in the sum of $25 per week commencing March 9, 2005, until the sum of $159.51 representing "medical mileage and prescription reimbursement" was paid. The Judge also suggested, "for record keeping purposes," that claimant should file a new application for hearing to initiate a separate claim for the upper extremity injuries that claimant sustained after October 9, 2000.

Respondent and Commerce contend Judge Hursh erred. They first argue the Judge had no jurisdiction to enter an order against them under the Workers Compensation Act for medical treatment for an accidental injury for which no E-1, Application for Hearing, had been filed. Second, they argue the May 18, 2004, Order only pertained to medical treatment recommended by Dr. Storm and, therefore, the order did not pertain to a reimbursement for the mileage driven to obtain that treatment. Third, they argue the alleged medical mileage expense has not been proven. And fourth, respondent and Commerce argue there is no statutory basis for imposing a weekly penalty in any sum for unpaid medical bills. Accordingly, respondent and Commerce request the Board to vacate the October 7, 2005, Order for lack of jurisdiction, to reverse the Order, or to modify it.

Conversely, claimant contends the Order for penalties should be affirmed.

The issues before the Board on this appeal are:

1. Should a penalty be assessed against respondent and Commerce for failing to reimburse claimant for the mileage allegedly driven to obtain medical treatment?

2. If so, how much penalty is appropriate?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds as follows:

1. As indicated above, this claim for bilateral upper extremity injuries was settled on January 21, 2002. At the settlement hearing, respondent was represented and Business Insurance Company and St. Paul participated as respondent's insurance carriers. According to the settlement hearing transcript, claimant received $9,625.68 for her bilateral upper extremity injuries while reserving her right to seek future medical benefits and her right to seek review and modification of her award. Business Insurance Company (then represented by Ronald J. Laskowski) agreed to pay $2,000 of the settlement award and St. Paul (then represented by Katharine M. Collins) agreed that it was responsible for the remainder of the terms of settlement. It is noteworthy the parties agreed at the settlement hearing that October 9, 2000, was the appropriate date of accident in this claim for the repetitive trauma injuries to claimant's upper extremities.

2. Following the January 2002 settlement hearing, claimant continued to work for respondent. In early 2003, claimant desired additional medical treatment and St. Paul provided claimant with the medical services of Dr. Bradley W. Storm, who performed carpal tunnel release surgery on claimant's right hand in August 2003 and who then performed the same surgery on claimant's left hand in September 2003. Dr. Storm released claimant to full duty in October 2003.

3. Despite stipulating at the January 2002 settlement hearing that the appropriate date of accident for this claim was October 9, 2000, claimant filed with the Division of Workers Compensation an amended E-1, Application for Hearing, in which claimant attempted to change the date of accident. Over two years after the settlement hearing, on January 29, 2004, claimant filed the amended E-1, which alleged a date of accident of "[e]ach and every day worked through the present." (Claimant's original E-1, which was filed with the Division on December 12, 2000, alleged the date of accident was "[e]ach and every day worked through Oct. 9, 2000.")

4. Claimant continued to work for respondent following her bilateral carpal tunnel release surgeries. According to claimant, she performed duties that were similar to those she was performing in October 2000. Unfortunately, claimant began experiencing worsening symptoms up into her arms, which was diagnosed by Dr. Storm as cubital tunnel syndrome.

5. Claimant requested respondent and St. Paul to provide additional medical treatment to address her worsening upper extremity symptoms. But that request was denied. Consequently, on February 3, 2004, claimant filed an E-3, Application for Preliminary Hearing, in which she alleged an accident date of "[e]ach and every day worked through the present."

6. On February 23, 2004, the parties appeared before Judge Hursh to address claimant's preliminary hearing request for additional medical benefits. Claimant testified that she had undergone bilateral carpal tunnel release surgeries in late 2003 and that Dr. Storm was now recommending treatment, including surgery, for bilateral cubital tunnel syndrome.

7. The only insurance entity to attend the February 23, 2004, hearing was St. Paul. St. Paul's attorney told the Judge that St. Paul accepted responsibility for the 2003 carpal tunnel surgeries as claimant's original injury was diagnosed as carpal tunnel syndrome. St. Paul, however, did dispute its responsibility for the now-diagnosed cubital tunnel syndrome as Dr. Storm believed claimant did not have that malady until June 2003, which was after St. Paul's coverage ended.[2] In essence, St. Paul argued the cubital tunnel syndrome was a new problem that was unrelated to the original injury and, therefore, the cubital tunnel syndrome was not its responsibility.

8. Following the February 23, 2004, hearing, Judge Hursh did not immediately rule upon claimant's request for additional medical benefits but, instead, awaited Dr. Storm's deposition. Dr. Storm, who was deposed on March 15, 2004, testified that claimant's carpal tunnel syndrome had worsened after October 2000 due to the natural progression of the syndrome but that it also had been aggravated by the work she had continued to perform for respondent.[3] Regarding the bilateral cubital tunnel syndrome that he had diagnosed, Dr. Storm concluded it had worsened due to the work claimant performed after June 2003 and due to the physical therapy claimant performed following her carpal tunnel release surgeries.[4]

9. On March 24, 2004, Judge Hursh entered an order entitled Post Award Medical Order in which the Judge denied claimant's request for additional medical benefits in this claim. The Judge held he was considering claimant's request for medical treatment of the cubital tunnel syndrome in light of the stipulated October 2000 accident date despite the fact claimant had filed an amended application for hearing to amend the accident date. The Judge then found the cubital tunnel syndrome appeared to result from the work claimant performed after October 2000. Consequently, the Judge denied claimant's request for additional medical benefits. Noting the somewhat unusual procedural history of this claim, the Judge held the question of whether claimant sustained injuries after the stipulated October 9, 2000,

---

[2] At the hearing, claimant's attorney represented that St. Paul's coverage ended in March 2002.

[3] Storm Depo. at 7.

[4] *Id.* at 10-11.

accident date would properly be the subject of a preliminary hearing. The Judge stated, in part:

> Procedural note. This case was the subject of a January 21, 2002 settlement hearing in which the parties stipulated to an accident date of October 9, 2000. The claimant has since (on January 29, 2004) filed an amended application for hearing to allege accidental injuries each and every work day since January 1, 2002. This amended accident date has not been the subject of a stipulation by both parties or a finding by the court. This post-award decision was rendered considering the stipulated accident date of October 9, 2000 for which the original award was made. Whether there have been injuries subsequent to October 9, 2000 in this case would properly be the subject of a preliminary hearing, if the parties cannot reach an agreement on that issue.[5]

That Order was not appealed.

10. On April 5, 2004, claimant filed another application for a preliminary hearing in this claim. That application alleged yet another accident date for this claim of "[o]n or about 10/9/2000 and each and every day worked through 1/29/2004."

11. A hearing was held on May 17, 2004. At that hearing, only St. Paul appeared as respondent's insurance carrier. Accordingly, there was no appearance on behalf of respondent nor its subsequent insurance carrier for purposes of the accidental injury that claimant alleges occurred following the January 2002 settlement.

In preliminary statements at the May 17, 2004, hearing, the attorneys and Judge stated, in part:

> THE COURT: And, Ms. Collins, I understand you're here in kind of a limited capacity with reference to what's apparently a prior claim?
>
> MS. COLLINS: **That's correct, Judge. I'm representing Kansas University Physicians and St. Paul Fire & Marine Insurance Company for an injury date of October 9, 2000.**
>
> THE COURT: And that's a claim that was previously the subject of a settlement hearing and I believe we had a previous post-award

[5] Post Award Medical Order (Mar. 24, 2004) at 2. The Board notes the date of accident in the amended application for hearing filed on January 29, 2004, reads "[e]ach and every day worked through the present" rather than "each and every work day since January 1, 2002" as referenced here.

> hearing on that matter but it was determined at that time that the claimant had sustained a subsequent injury and you don't have any representation with regard to the subsequent injury, correct?
>
> MS. COLLINS: That's correct.
>
> THE COURT: Okay. Very good. **So really, there's no one here representing the respondent in regard to this new injury. How did that come about, Mr. Miller?**[6] (Emphasis added.)

Both St. Paul's attorney and claimant's attorney announced they had written respondent advising it to contact their present insurance carrier about claimant's new alleged injuries. Moreover, claimant's attorney announced that he wrote respondent and advised the company of the scheduled hearing. At the conclusion of the hearing, Judge Hursh announced that he would be consistent with his previous order and, therefore, he intended to order respondent and its insurance carrier to provide claimant with medical treatment for the work-related injury claimant sustained after the January 2002 settlement hearing.

> Okay. Then those are received. And consistent with the previous post-award order, I will go ahead and issue an order for the respondent and insurance carrier, whoever it may be, to provide some medical treatment for a subsequent work-related injury subsequent to the previous settlement hearing and I'll get that out just as soon as possible.[7]

12. As announced the day before, on May 18, 2004, Judge Hursh issued an Order in which the Judge found claimant injured her upper extremities due to the work she performed after the January 21, 2002, settlement hearing. The Judge held "respondent and its insurance carrier, if any, shall provide reasonable and necessary medical treatment for the claimant's upper extremity injuries as recommended by Bradley W. Storm, M.D."[8] Again, the Judge added a procedural note in the Order to help explain the somewhat unusual nature of this claim.

> This preliminary hearing proceeded without an appearance on behalf of the respondent for the alleged series of injuries through January 29, 2004. Katharine Collins appeared for the respondent and

---

[6] P.H. Trans. (May 17, 2004) at 3-4.

[7] *Id.* at 7.

[8] Order (May 18, 2004) at 1.

> insurance carrier, St. Paul, in regard to a claimed injury of October 9, 2000 which was settled on January 21, 2002. The respondent was advised of this preliminary hearing, and was advised that Ms. Collins would not represent their interests for the claimed series of injuries through January 29, 2004.[9]

The Order was not appealed.

13. Although claimant filed an Application for Post Award Medical on June 30, 2004, there is no indication a hearing was held on that request.

14. On June 27, 2005, claimant filed an Application for Civil Penalties against respondent on the basis that it had violated the May 18, 2004, Order mentioned above. Although the application named Business Insurance Company as respondent's insurance carrier, the certificate of mailing indicated it was mailed to attorney John B. Rathmel, who entered his appearance in this claim on behalf of respondent and Commerce & Industry Insurance Company. The application for penalties alleged claimant was entitled to receive penalties as respondent and its insurance carrier had failed to pay medical mileage reimbursement.

15. On July 5, 2005, claimant filed another Application for Civil Penalties repeating the allegations she had made in the earlier application for penalties. But this time claimant named both Business Insurance Company and St. Paul as respondent's insurance carriers. Again, Mr. Rathmel was shown as being mailed a copy of the pleading.

16. Claimant, on August 1, 2005, filed another application for preliminary hearing.

17. The parties next appeared before Judge Hursh on October 5, 2005, to address claimant's request for penalties. Attorney Rathmel appeared as counsel for respondent and Commerce. According to the records of the Division of Workers Compensation, Mr. Rathmel entered his appearance on behalf of respondent in a letter to Judge Hursh dated May 26, 2004. Shelly Naughtin appeared for respondent and St. Paul. Following that hearing, Judge Hursh entered the October 7, 2005, Order, which is the subject of this appeal. Recognizing the very unusual and convoluted procedural history in this claim, the Judge again added a procedural note to his order.

[9] *Id.* at 1.

CONCLUSIONS OF LAW

The Order for penalties should be set aside as the Judge did not have jurisdiction over the respondent for purposes of the alleged injuries that claimant sustained following the January 2002 settlement hearing.

At this juncture, claimant alleges that she sustained a new and separate accidental injury following the January 2002 settlement. Judge Hursh agreed as the March 24, 2004, Post Award Medical Order mentioned above held that claimant's cubital tunnel syndrome was caused by the work claimant performed after October 2000. And the May 18, 2004, Order held that claimant injured her upper extremities at work after January 21, 2002.

But the series of accidents in this claim for repetitive trauma injuries to claimant's upper extremities ended October 9, 2000, as the parties previously stipulated. There is no showing that respondent and Commerce have agreed to modify the date of accident in this claim or that the Judge set aside the stipulated accident date. Accordingly, this claim is limited to the injuries that claimant sustained through October 9, 2000, and claimant's unilateral attempt to modify the parties' stipulation regarding the date of accident is ineffective.

Claimant did not initiate a separate claim against respondent by filing a new E-1, Application for Hearing, for the injuries that she now alleges occurred at work following the January 2002 settlement hearing. And respondent did not otherwise confer jurisdiction upon the Division of Workers Compensation by appearing or consenting to the proceedings held after the settlement hearing. Instead, counsel for St. Paul made it clear at the various hearings that counsel was not appearing on behalf of respondent for purposes of claimant's newly alleged injuries, but only for the injuries caused by the series of accidents ending October 9, 2000.

Under this very unusual set of circumstances, the Board concludes the Judge did not have jurisdiction over respondent in this claim to enter an order for medical treatment for the alleged accidental injury that occurred after the stipulated October 9, 2000, date of accident.

The conclusion in this appeal should not be confused, however, with those situations in which an injured worker requests additional medical benefits for new injuries that are the natural and probable consequence of an initial accidental injury. Nor should the conclusion be confused with those situations where an application for hearing is amended before an award and before the parties have stipulated to a date of accident. In the claim now before us, it is evident the Judge did not find that claimant's present need for medical treatment was a natural and probable consequence of her initial injuries. It should also be noted that the Board is making no factual determination at this time whether

the Judge erred in concluding claimant's present complaints are the result of a new and separate work-related accident as opposed to the natural and probable consequences of the bilateral upper extremity injuries that are the subject of this claim.

Claimant's request for attorney fees should first be presented to the Administrative Law Judge.

AWARD

WHEREFORE, the Board reverses and sets aside the October 7, 2005, Order for penalties.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Katharine M. Collins, Attorney for Respondent and St. Paul
John B. Rathmel, Attorney for Respondent and Commerce
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director